IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Criminal Appeal No.205-SB of 1994
Date of decision: 26.03. 2007

Gurnam Singh

-----Appellant.

Vs.

State of Punjab

-----Respondent.

CORAM:- HON'BLE MR JUSTICE ADARSH KUMAR GOEL

Present: Mr. H.S. Gill, Sr. Advocate with
Mr. R.K. Dhiman, Advocate
for the appellant.
Mr. M.S. Sidhu, Sr. DAG, Punjab.

This appeal has been filed by the accused against his conviction under Sections 366/376 IPC. He stands sentenced to undergo RI for 5 years under Section 366 IPC and to undergo RI for 7 years and to pay fine of Rs.5,000/- or in default to undergo further RI for one year under Section 376 IPC. The fine is to be paid to the prosecutrix.

Case of the prosecution is that 'M' was a student of 10th class in Government Girls High School, Khurdpur. In June, 1992, she was affected by evil spirit. The accused was called to treat her on the belief that he had capacity to treat such patients. He treated 'M' for about one month, on account of which, she recovered. The accused remained visiting the complainant. On 27.4.1993, the accused came to the house of the complainant and stayed for the night. During the

night, the victim was sleeping in a separate room. The accused went there and after threatening her that he will let loose the spirits, which he had driven away, if she raised alarm, he committed sexual intercourse without her consent and in the morning left the house. On 28.4.1993, the accused abducted 'M' when she was going to the school and took her with him and raped her repeatedly. She was with him from 28.4.1993 to 6.5.1993. During this period, they stayed at Jalandhar, Phagwara, Hoshiarpur, Chintpurni, Ludhiana and Sarai Jandialawala. Ram Pal, father of the victim lodged FIR with the police station on 1.5.1993. He was arrested by the police on 6.5.1993. After investigation, the accused was challaned and sent up for trial.

The prosecution examined Dr. Prem Nath Gupta (PW-1), Ram Pal (PW-2), Manjit Kaur (PW-3), Neeta Pal, Headmistress (PW-4), Dalip Singh, Draftsman (PW-5), Dr. Harleen Kaur (PW-6) and ASI Ram Sarup (PW-7).

PW-6 Dr. Harleen Kaur examined the victim 'M' and found her hymen torn. According to her, she was subjected to sexual intercourse. There was no mark of external injury. Number of teeth was 28. Secondary sex characters had developed. She admitted two fingers easily. According to report of the Chemical Examiner (Exh.PW6/B), semen was found on vaginal slides and vaginal swabs. According to Dr. P.N. Gupta (PW-1), the accused was capable of performing sexual intercourse.

The victim appeared as PW-3 and supported the prosecution version. Apart from rape committed on 27.4.1993, she stated that she was forced to accompany him on the threat that he will

bring back the evil spirits and make her sick and she was subjected to intercourse during the period from 28.4.1993 to 6.5.1993 at various places where she was taken by him. She made her statement before the Magistrate on 11.5.1993 (Exh.PD). In cross-examination, she stated that she did not suffer any physical pain and did not raise any alarm on account of fear of the accused. She did not receive any injury or scratch on her body as a result of struggle. She gave the bloodstained clothes to the police. She did not raise any alarm against the accused when she was taken to different places. PW-2 Ram Pal, father of the victim also supported the prosecution version.

Dr. Harleen Kaur (PW-6) assessed the age of the victim to be 15½ years. In cross-examination, she stated that she had mentioned the age as per information given by police and parents of the girl. According to school certificate (Exh.PE), her date of birth was 3.2.1978. On the date of arrest of the accused, her age was 15 years and 3 months. The certificate was proved by Neeta Pal, Headmistress (PW-4). Ram Pal, father of the victim also stated that the victim was born in February 1978. Ram Sarup, ASI proved the investigation conducted by him.

In his statement under Section 313 Cr.P.C., the accused denied the prosecution allegations.

After considering the evidence on record, the trial Court convicted and sentenced the accused.

I have heard learned counsel for the parties and perused the record.

Only contention which has been raised by learned counsel for the appellant is that the accused committed sexual intercourse with the victim with her consent and since her age was above 16 years, the appellant was entitled to acquittal. He submitted that school certificate (Exh.PE) was not conclusive of the age of the victim in absence of ossification test. Reliance has been placed on the judgments of this Court in ***Om Parkash v. State of Punjab*** 1983 All India Criminal Law Reporter 610 and ***Shrimati Ram Piari and another v. State of Haryana*** 1984(1) RCR (Criminal) 87, judgment of Delhi High Court in ***Brij Mohan v. State*** 1989(1) RCR (Criminal) 307, judgment of the Allahabad High Court in ***Baldeo v. State of U.P.*** 1993 CRI.L.J.1915 and judgment of the Hon'ble Supreme Court in ***Jagtar Singh v.State of Punjab*** 1993 CRI.L.J. 2886.

Learned counsel for the State submitted that since the commission of sexual intercourse by the accused-appellant with the victim 'M' stands fully established by the evidence of the victim which is supported by medical evidence, consent of the victim could not be inferred in favour of the accused in view of fear in the mind of the victim and in any case, the age of the victim being below 16 years, even if the consent is to be inferred, the offence was fully proved. It was submitted that the ossification test may have been useful, but mere absence thereof is not enough to infer that the victim was more than 16 years of age. It was also submitted that the judgments relied upon are distinguishable. Though the school certificate may not be conclusive and in the present case, the school certificate was corroborated by the evidence of father of the victim as well as the

statement of the victim herself. The victim was a student of 10th class and was a minor girl. The accused has used undue influence and exploited the position of confidence which he enjoyed.

I have considered the rival submissions.

The contention raised on behalf of the appellant that consent of the victim could be inferred on account of victim having not raised any alarm for 10 days, when she had accompanied the accused and visited different places, would have required serious consideration. She had the opportunity to seek intervention of the people around if she was not the consenting party. However, this question need not be gone into having regard to the age of the victim.

The evidence of PW-2 Ram Pal, father of the victim is categorical that she was born in February, 1978. This has been corroborated by certificate (Exh.PE), duly proved by PW-4 Neeta Pal, Headmistress of the school. PW-6, Dr. Harleen Kaur also stated the age of the victim to be 15½ years.

The evidence of father of the victim and entries in the school register which are *ante litem motam* are admissible evidence. Reference may be made to the judgment in ***Mohd. Ikraqm Hussain v. The State of Uttar Pradesh and others*** AIR 1964 SC 1625, wherein it was observed:-

> **"16.** In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school registers which showed that on June 20, 1960 she was under 17 years of age. There were also the affidavit of the feather stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age.

> These amounted to evidence under the Indian evidence Act and the entries in the school registers were made *ante litem motam....."*

It cannot be laid down as a matter of law that entry in school register is not to be taken into account. The school certificate may not be conclusive, but may be relevant. In the facts and circumstances of entry in the school register, if corroborated by other circumstances, can be taken into account for determining the age.

There are judgments wherein entries in school register have not been relied upon for want of genuineness of such register. (***Ram Deo Chauhan @ Raj Nath Chauhan v. State of Assam*** AIR 2001 SC 2231, Para 41). In the said judgment, in para 43, it was observed that x-ray ossification test was also not infallible and accurate to indicate the exact date of birth.

Reference may now be made to the judgments relied upon by learned counsel for the appellant.

In ***Om Parkash*** (*supra),* it was held that the school certificate could not be conclusive piece of evidence. This judgment is distinguishable as in the present case, apart from school certificate, the father of the victim has deposed about the age.

In ***Shrimati Ram Piari*** *(supra),* the accused claimed to be juvenile only on the basis of school certificate and it was held that at the stage of bail, only entry in the school register could not be treated as conclusive and his age had been given by his step-brother to be 17/18 years. The said judgment is also distinguishable.

In ***Brij Mohan*** (*supra*), oral testimony was found to be not reliable. Only evidence of school record was not found to be sufficient to accept the age of the victim to be below 16 years when medical evidence was that she was above 16 years of age. This judgment is also distinguishable.

In ***Baldeo*** *(supra),* the medical opinion was that the victim was 16/17 years of age, which was accepted by the Court. This judgment is also distinguishable.

In ***Jagtar Singh*** *(supra),* the appellant claimed to be juvenile only on the basis of school certificate. The said certificate stated that the appellant had been admitted into the school about an year earlier without stating as to in which school he was earlier. On the other hand, there was other evidence to show that the accused was more than 18 years of age. The said judgment is also distinguishable.

In the present case, school certificate is of a Government school. The victim was already in the said school as per the certificate issued. Entry of date of birth was much prior to the date of occurrence and no doubt could be raised about its genuineness. PW-4 Neeta Pal, Headmistress of the Government School had no interest in preparing false record.

Thus, age of the victim has to be held to be below 16 years. Contention raised by learned counsel for the appellant is liable to be rejected. The offence of rape is clearly established. Conviction and sentence of the appellant are liable be upheld.

Accordingly, the appeal is dismissed.

March 26, 2007 (**ADARSH KUMAR GOEL)**
ashwani **JUDGE**